Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STANLEY HUNKINS, individually
and d/b/a Muse Ten Center, et al.,

Petitioners,

vs.

CITY OF MINNEAPOLIS,
THE MINNEAPOLIS COMMUNITY DEVELOPMENT
AGENCY, and MINNESOTA TECHNOLOGY
CORRIDOR CORPORATION,

SUPPLEMENTAL APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

Paul Engh
Suite 1600, Foshay Tower
821 Marquette Avenue
Minneapolis, Minnesota 55402
Telephone (612) 335-3700
Attorney for Petitioners

Lawrence H. Crosby
St. Paul, Minnesota
Of Counsel

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Stanley Hunkins, individual
and d/b/a Muse Ten Center, and
Corridor Properties, Inc.,

Plaintiffs,

ORDER AND MEMORANDUM
File No. MC 91-21459

vs.

City of Minneapolis, a municipal
corporation; the Minneapolis Community
Development Agency; and Minnesota
Technology Corridor corporation, a
Minnesota corporation,

Defendants.

The above-entitled matter came on before the under signed Judge of District Court on October 29, 1992, pursuant to defendants' motion for summary judgment.

Michael Berens, Esq. and Mary Jahnke, Esq. appeared on behalf of plaintiffs; Michael Norton, Esq. appeared on behalf of defendant City of Minneapolis; James Dorsey, Esq. and Mark Simpson, Esq. appeared an behalf of defendant Minneapolis Community Development Agency; and Corey Ayling, Esq. appeared on behalf of defendant Minnesota Technology Corridor Corporation.

Based upon the arguments of counsel, memoranda, files, records, and proceedings herein, the Court makes the following:

ORDER

1. That defendants' motion for summary judgment is **GRANTED** in its entirety.

2. That the attached memorandum be hereby incorporated herein by reference.

LET JUDGEMENT BE ENTERED ACCORD-

INGLY.

BY THE COURT:

Beryl A. Nord
Judge of District Court

Dated: This 27th day of January, 1993.

MEMORANDUM

Facts:

This matter arises out of a rezoning decision made by defendant City of Minneapolis which plaintiffs claim adversely affects the value of the property they own within the rezoned area and amounts to a "taking" for which they must be compensated. The material facts are not in dispute. In June and August of 1983, plaintiff Stanley Hunkins purchased two parcels of land

in the Industry Square Development Area of Minneapolis. There were two buildings already on the properties and it was plaintiff Hunkins' intent to develop an office complex. He had plans to develop the property in phases for use as a "business incubator" where companies which were just starting out would rent office space and have access to on-site support services. Plaintiff Hunkins projected that as the businesses grew and needed more space he would create a core building and then renovate the second building to provide larger office space for the growing companies to move into.

In July 1984, plaintiff Hunkins received a building permit from the City to begin the initial construction of what would be known as Muse Ten Center. Prior to beginning construction, defendant City had recommended to the State of Minnesota that Muse Ten be given Enterprise Zone status. Pursuant to Minn. Stat. S469.166, this status can be given to development projects located in blighted urban areas. The Muse Ten project received

such status and as a result was entitled to certain tax exemptions and credits. Muse Ten opened its doors in December 1984.

Simultaneous to plaintiff Hunkins' negotiation for and purchase of the Muse Ten property, a Minneapolis Task Force on Research and Technology was at work studying the feasibility of developing a "Technology Corridor" to encourage the incubation and growth of scientific, technological, and research-oriented industry. The Task Force submitted a detailed recommendation for a Technology Corridor to the Mayor and the City Council on August 15, 1983. The location identified for the Technology Corridor in this recommendation was an area known as the Industry Square Development Area. The parcels of land which plaintiff Hunkins purchased were located in this area. The Task Force proposed, among other things, that the Minneapolis Community Development Agency ("MCDA") and the Minneapolis Planning Department, in cooperation with the University of Minnesota and the Industry Square Development Community,

prepare a development plan for the Technology Corridor. In February 1985, a comprehensive study on the Technology Corridor which had been prepared by defendant MCDA was adopted by defendant City.

On June 12, 1986, the Minneapolis City Council passed a resolution regarding the Minnesota Technology Corridor which reads in relevant part:

> WHEREAS, the City Council has established a technology corridor for the purpose of attracting high-technology and research activities and businesses; and
>
> WHEREAS, the regulations in existing zoning districts do not adequately protect and encourage the desired uses;
>
> NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MINNEAPOLIS:
>
> That the Minneapolis Planning Department is hereby directed to develop new zoning regulations and conduct a 40-acre study for the Technology Corridor...
>
> Be it Further Resolved that no building permit shall be granted by the Director of Inspections or his agents in the affected area for a period of six months or

> until the completion of the 40-acre study and until the application has been reviewed by the City Council for compatibility with the Minnesota Technology Corridor Plan (Petn No. 234002), adopted by the City Council on February 8, 1985.

The Resolution was approved by Mayor Fraser June 19, 1986. The City Council subsequently extended the building permit moratorium to June 21, 1987, and on June 12, 1987, it was again extended by the City Council "for an additional six months, or until the completion of the rezoning study, which ever occurs first."

Before the moratorium was adopted, plaintiff Hunkins had already started renovation of the Muse Ten buildings. The City had already approved building plans that permitted plaintiff Hunkins to continue the rehabilitation of his buildings during the moratorium period. Moreover, additionally construction took place on the Muse Ten property during the moratorium period and a building permit was issued for the work.

In December 1986, the Secor Study was published. The

Secor Study was a study sponsored by defendant MCDA and defendant Minnesota Technology Corridor Corporation ("MTCC") to assist in the development of a Technology Corridor. The Secor Study proposed a 10 to 20 year course of action for development of the Technology Corridor and advocated a change in zoning as an initial step in the development.

On December 19, 1986, the City Council adopted three ordinances enacting Chapters 570, 571 and 572 of the Minneapolis Zoning Code. These Chapters set forth the text of the Technology Corridor zoning requirements. As was advocated in the Secor Study, the new zoning laws created two districts: the "IT" district which allowed technology intensive uses (as defined by the ordinance) and "TC" which allowed commercial uses supportive of technology intensive uses. In August 1987, the City set the zoning boundaries for the Technology Corridor which applied the zoning text to the specific property in the Corridor. Muse Ten was located in the "TC" district, surrounded by blocks

in the "T" zone.

During the period of time between the rezoning proposals and the enactment of the actual zoning ordinances, Randy Hamborg, President of plaintiff Corridor Properties, Inc., (the managing agent for the Muse Ten property at that time) registered his objections to the proposed zoning and how it would be applied to Muse Ten. He vocalized his objections at a meeting of the Planning and Zoning Committee on June 16, 1987 and memorialized his objections in writing to the Members of the Board of the MTCC in a letter dated June 22, 1987. Other landowners in the Technology Corridor area also objected to the rezoning.

On July 24, 1987, plaintiff Hunkins was notified by his lender that it no longer wanted to be part of the financing of the Muse Ten development. It cited as its reasons: 1) the lack of cash flow ,until the second building was rehabbed and the lack of funds available to accomplish it; 2) the proposed zoning changes

and 3) the short term leases of the current tenants and their limited financial strength.

It is unclear if the Muse Ten incubator office complex was a permitted use under the "TC" zoning ordinance or at the very least a legal nonconforming use. After the zoning was applied to the Technology Corridor in August 1987, plaintiff Hunkins did not submit a formal petition for rezoning, nor did he fill out a "permitted use" application or formally seek a zoning variance. Plaintiff never submitted a development plan to the City or in any formal way seek a governmental ruling that its use was nonconforming. Plaintiff Hunkins claims he submitted a development plan to the city in or around July 1984, and the City approved it. However, the exhibit plaintiff cites to is nothing more than a building permit issued for Muse Ten dated July 5, 1984.

In early 1988, Randy Hamborg requested approximately $3.9 million in funding from defendant MCDA to continue

development of the Muse Ten Center. On March 31, 1988, the MCDA denied the request for bond financing. In the spring of 1988, Hamborg asked the City to purchase the Muse Ten Property for $3,000,000. On May 23, 1988, the City rejected Hamborg's offer. After plaintiff Hunkins was unable to obtain other financing for the completion of the second phase of the development, he eventually sold Muse Ten, on December 28, 1988, to plaintiff Corridor Properties, the entity which had been managing Muse Ten for plaintiff Hunkins since 1985, for $1,350,000.

Throughout plaintiff Hunkins' attempts to refinance and/or sell Muse Ten, he continued to register his objections to the downzoning. Plaintiff Hunkins enlisted the help of City Council member Van White as well as U.S. Senator Rudy Boschwitz. On September 30, 1988, plaintiff Hunkins wrote a letter to Mayor Fraser outlining how his hopes for the Muse Ten Center had been crushed by the enactment of restrictive zoning, siphoning of

funds from the zone, and failure to carry out the mandate for development in the enterprise zone. Additionally, an October 4, 1988, plaintiff Hunkins registered his objections to the restrictive zoning with the Commissioner of Trade and Economic Development.

With respect to real estate taxes on the Muse Ten prop erty, plaintiffs admit that the only taxes they paid were the real estate taxes for the first half of 1986. Otherwise, Muse Ten has not paid its property taxes from 1986 through 1991. When plaintiff Hunkins failed to pay Muse Ten's real estate taxes due in 1986, Hennepin County notified plaintiff Hunkins that a judgment would be entered against Muse Ten for the unpaid taxes. On April 17, 1987, a tax judgment was entered against Muse Ten for non-payment of real estate taxes in 1986. No steps were taken to prevent the entry of that judgment or to appeal the judgment. The back taxes owed to the County total $577,513.00 in current and back property taxes, penalties and interest.

On April 9, 1991, defendants assert Muse Ten was forfeited to the State of Minnesota for nonpayment of real estate taxes. Whether this forfeiture was effective is the subject of a separate lawsuit. The county maintains it complied with all of the legal requirements for the tax forfeiture and that therefore title to the property is now vested in the State. Plaintiffs assert the service was improper and that the statute under which the State purportedly seized the Muse Ten property is unconstitutional. Since the forfeiture action, defendant MTCC and MCDA as well as other government officials have made inquiries into acquiring ownership of the properties.

In November 1991, plaintiffs commenced this 5 count lawsuit. Count I alleges a violation of 42 U.S.C. S1983 based upon an alleged deprivation of due process rights. Count 11 is a due process and unlawful taking claim based upon alleged violations of Article 1, S52 and 13 of the Minnesota Constitution. Count III bases those same claims upon alleged violations

of the United States Constitution. Counts IV and v are conspiracy claims based upon alleged violations of 42 U.S.C. S1983 and Article 1, SS2 and 13 of the Minnesota Constitution, respectively.

Defendants now come before this court seeking summary judgment. They first argue that this Court does not have jurisdiction over plaintiffs' takings claims because plaintiffs failed to obtain a final zoning determination from the City, and did not bring an action seeking injunctive relief. With respect to the Federal claims brought under the U.S. Constitution and 42 U.S.C. S1983, defendants also assert that not only should they be dismissed because plaintiffs did not satisfy the finality requirement, they must be dismissed because plaintiffs did not pursue their state law remedies. Irrespective of the ripeness issues, defendants also argue that this action must be dismissed on the merits as well. Defendants conten[d] that since the zoning ordinance did not deprive plaintiffs of all reasonable uses of their

property, it did not effect a "taking." Defendants aiso argue that plaintiffs' section 1983 and conspiracy claims must be dismissed as derivative. Lastly, defendants maintain that regardless of how the court views its other arguments, defendant MTCC and plaintiff Corridor Properties must be dismissed as improper parties.

Rule 56 of the Minnesota Rules of Civil Procedure allows a court to enter summary judgment as a matter of law when it has been shown there are no genuine issues as to any material facts. Gaspord v. Washington County Planning Commission, 252 N.W.2d 590, 591 (Minn. 1977). A material fact is one of such a nature as will affect the result or outcome of a case depending on its resolution. Zappa v. Fehey, 310 Minn. 555, 245 N.W.2d 258, 259 (1976). In order to oppose a motion for summary judgment, the non-moving party must demonstrate at the time of the motion that specific material facts exist which create a genuine issue for trial. Hunt v. IBM MidAmerican Employees Federal credit

Union, 384 N.W.2d 853, 855 (Minn. 1986). The opposing party has the benefit of that view of the evidence most favorable to it. Sauter v. Sauter, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955). In addition, all doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957).

Ripeness:

Defendants' first argument is that this Court does not have jurisdiction over plaintiffs' takings claims because plaintiffs failed to obtain a final zoning decision from the City and did not bring an action seeking injunctive relief. It is defendants' position that plaintiffs were under an obligation to obtain a final determination from the City as to how the zoning ordinances would affect their property. Thereafter, defendants argue, if the final determination prevented plaintiffs' development plans, plaintiffs were required to file an action for injunctive relief. Having failed to even seek a final determination as to how the

City would apply the zoning restrictions to plaintiffs' property, let alone file for injunctive relief, defendants assert plaintiffs' taking claims must be dismissed.

Plaintiffs argue a number of things, however, the essence of their argument is that the city was well aware of the negative effects downzoning would have on plaintiffs' property and that given that knowledge, the City's imposition of the downzoning on Muse Ten was a final zoning determination. Plaintiffs claim that it was at that point that the City demonstrated it had arrived at a final, definitive position regarding how it would apply the zoning and that any further action on their part would have been futile and therefore, unnecessary. This court cannot agree with plaintiffs.

The question of what constitutes a taking for purposes of the Fifth Amendment has never been an easy question for the courts to grapple with. Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 123, 57 L.Ed.2d 631, 98 S.Ct. 2646

(1978). However, the United States Supreme Court has consistently indicated that among the factors of particular significance in the inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. Id. at 124, 57 L.Ed.2d 631, 98 S.Ct. 2646.

Notwithstanding the Supreme Court's acknowledgment of the importance of those factors, the Supreme Court has consis tently held that "[t]hose factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Williamson Planning Comm´n v. Hamilton Bank, 473 U.S. 172, 191, 87 L.Ed.2d 126, 141, 105 S.Ct. 3108 (1985). "A claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186, 87 L.Ed.2d 126,

139, 105 S.Ct. 3108; Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.-S. 264, 297 (1981). As the Supreme Court explained in MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 91 L.Ed.2d 285, 106 S.Ct. 2561 (1986):

> [A regulatory taking claim] has two components. First, appellant must establish that the regulation has in sub stance "taken" his property--that is, that the regulation "goes too far." Second, appellant must demonstrate that any proffered compensation is not "just."
>
> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.

Id. at 348, 91 L.Ed.2d 285, 294, 106 S.Ct. 2561.

In Minnesota, the Court of Appeals dealt with the ripe ness issue in Thompson v. City of Red Wing, 455 N.W.2d 512 (Minn. App. 1990). The court cited the MacDonald and Williamson cases when it found that "[e] conomic impact and

interference with expectation interests cannot be evaluated until after a final application of the regulations to the land in question." Thompson at 516. The Thompson court also noted that "(a] challenge to the application of a regulation is not ripe when the landowners have not submitted a development plan." Id.; Furthermore, a "takings claim is also not ripe where only one plan is rejected and no other plan is proposed." Id.; see Williamson, 473 U.S. at 186-95 (requiring request for and denial of zoning variance before inverse condemnation action is ripe).

Moreover, this finality requirement applies regardless of the manner in which the regulatory taking claim is framed - whether as a violation of the Just Compensation Clause, the Due Process Clause, or 42 U.S.C. 1983. Williamson, 473 U.S. at 197-200. As the Williamson Court stated:

> Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes

> so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an .analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Id. at 199-200, 87 L.Ed.2d 126, 147, 105 S.Ct. 3108. As defendants point out, all five counts of plaintiffs' complaint allege, at root, a taking in violation of either the Just Compensation Clause or the Due Process Clause.

It is clear that in the instant case, plaintiffs' claims are not ripe and defendants' motion for summary judgment must be granted. There is no dispute here that plaintiffs have not followed the procedures which were available to get a final determination as to how the "TC" designation would be applied to their property. Plaintiffs have not argued that adequate procedures were unavailable to obtain a final determination. In fact, a special

procedure had been adopted by the Minneapolis City Council with respect to applications for zoning determinations in the Technology Corridor. All applications were referred to the MTCC for comment, then the Zoning Administrator would make a determination that could be appealed to the Board of Adjust ment and Appeals, and finally to the Minneapolis City Council. Plaintiffs took none of these steps.

Plaintiffs argue that the finality requirement has been met because the City had come to a definitive position regarding how it was going to apply the zoning regulations. Plaintiffs point out that throughout the entire time the defendants were considering the downzoning, plaintiffs were actively attempting to educate the government about the devastating effect the proposed regulations would have on the Muse Ten project. Plaintiffs contend that the defendants knew exactly what the effect on Muse Ten would be, but, downzoned the area anyway. Plaintiffs cannot imagine how anything they may have done would have changed

the collective mind of the City Council with respect to the downzoning.

Plaintiffs miss the point of the finality requirement. The object of a finality determination is not to force plaintiffs to jump through some administrative hoops, it is to force the decision-maker to arrive at a definitive position on the issue that inflicts an actual, concrete injury. Williamson, 473 U.S. 172 at 193. In the instant case, this court has no way of measuring-the impact of the zoning ordinance on plaintiffs' property. Plaintiffs claim that all was lost in August of 1987 when the City applied the zoning ordinances. However, this court has no way of knowing that. While it is fairly clear that the downzoning adversely affected plaintiffs' plans for Muse Ten, it is not at all clear to what extent. Plaintiffs claim that it could not move to the next phase in its development of the Muse Ten complex because it would be non-conforming. Yet, there was never a determination that it would be nonconforming because it was

never submitted for such a determination. Plaintiffs argue that the downzoning limited Muse Ten's leasing possibilities by forbidding new nonconforming tenants. Again, that issue was never submitted. Indeed, no development plan was ever submitted to the City after the zoning change. Plaintiffs argue that they submitted a development plan in 1984 and that the City was well aware of their plans for Muse Ten. However, given the holding in Thompson supra, regarding submissions of development plans, it is somewhat disingenuous to argue that a development plan submitted in 1984 would be sufficient under the circumstances.

Plaintiffs spent a great deal of time arguing that this court must not consider this case in a vacuum - that it must look at all the facts to recognize how different the instant fact situation is from the other cases wherein the courts required the parties to seek a final determination. But, this court fails to see how these plaintiffs are any different from any other landowner who is

aggrieved by a rezoning decision. This court cannot imagine that any number of zoning decisions are not met by staunch opposition with avid lobbying pro and con throughout the consideration process. Indeed, it would be ludicrous to assume that any regulatory agency would make such important decisions without asking for input and thoroughly weighing the pros and cons. In the instant case, merely because plaintiffs feel they have been ignored and the zoning decision ran adverse to their stated desires, it does not mean that seeking a final determination or a variance is futile. It should be remembered that the City rezoned a rather large area to embark on a long-term project which was just beginning. How committed the City was to the guidelines of the Secor Study was never tested. What the City interpreted the zoning definitions to encompass was likewise never tested. This court has no way of knowing what property rights plaintiffs have lost. It is worth noting that at least one other property owner in the area sought to improve an already existing structure,

a liquor store, and it was approved. Plaintiffs failed to get a final determination as to how the zoning would affect their property, therefore, their claims are not ripe and the Complaint must be dismissed.

Injunction:

The Minnesota Supreme Court in McShane v. City of Faribault, 292 N.W.2d 253, 259 (Minn. 1980), recognized the use of an injunction against enforcement of an ordinance as a proper remedy for landowners whose property has been taken by virtue of inverse condemnation. Inverse condemnation is when property is taken for public use absent a formal condemnation proceeding. Alevizos v. Metropolitan Airport Comm´n, 298 Minn. 471, 216 N.W.2d 651 (1974). In McShane, the property owners had sought relief from an airport zoning ordinance by use of mandamus. The McShane court, noting that mandamus was an inappropriate remedy where there was a plain, speedy, and adequate remedy in the ordinary course of law, found that an

injunction against enforcement of the ordinance would provide the appropriate remedy. McShane, 292 N.W.2d at 259. The court noted, "[the city] would then have the option of repealing the ordinance or retaining it and initiating eminent domain proceedings to compensate plaintiffs for its effects." It further stated, "[o]nly where the taking or damage is irreversible, would an injunction against enforcement not provide an adequate remedy." Id.

Accordingly, the appropriate remedy in this case was to bring an action to enjoin the zoning ordinance after plaintiffs had obtained a final zoning determination that restricted their development plan. If plaintiffs had been successful in such an action, and the City decided to keep the zoning in effect, the City could then be compelled by writ of mandamus to institute condemnation proceedings. If the City decided to repeal the zoning ordinance, plaintiffs could obtain damages for a temporary taking of property. See First Lutheran Church v. Los Angeles County, 482

U.S. 304, 96 L.Ed.2d 250, 107 S. Ct. 2378 (1987).

Plaintiffs argue again that it would have been futile to seek an injunction since the damage was irreversible at the time the City enacted the zoning ordinances. Plaintiffs again argue that the defendants were well aware of the impact their actions would have had on Muse Ten's value and that there is no reason to believe that an injunction, on top of every other action that the plaintiffs had taken, would have caused the downzoning to be repealed. However, that argument belies their continuing attempts, well into 1991, to change that zoning. It also does not take into account the economic realities which the City Council would have been forced to face up to had plaintiffs successfully brought an injunction. Where the damages are not irreversible, an action for injunctive relief is the appropriate remedy.

Plaintiffs have included a prayer for mandamus to compel condemnation proceedings in the ad damnum clause of their Complaint. However, without even determining whether it is

properly pled or supported, a mandamus count cannot be asserted until: (1) the plaintiffs prevail on an action to enjoin the ordinance, and (2) the City decides that it wants to keep the ordinance in effect. It is at that point that a writ of mandamus would be appropriate to compel condemnation proceedings.

Pursuit of State Remedies:

Assuming, for the sake of argument, that plaintiffs' claims are ripe for review and that an injunction was not a necessary step before initiating this suit, it is clear to this court that Counts I (Violation of 42 U.S.C. S 1983), III (Violation of Fifth Amendment to U.S. Constitution) and IV (Conspiracy to Violate 42 U.S.C. S1983) must be dismissed because plaintiffs did not pursue their state law remedies.

In Williamson, the United States Supreme Court decided that a landowners' claim under the U.S. Constitution and 42 U.S.C. S1983 for a taking of property without just compensation was not ripe where state law procedures were available

to obtain just compensation. With respect to claims brought under the Fifth Amendment, the Court held: "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield(s] just compensation,' then the property owner 'has no claim against the Government for a taking.'" Williamson, 473 U.S. at 194-195. "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195.

Since Williamson, courts have dismissed federal takings claims under the United States Constitution and 42 U.S.C. S1983 when the state has adequate procedures for obtaining just compensation. See Estate of Himmelstein v. City of Fort Wayne, Ind., 898 F.2d 573, 576 (7th Cir. 1990) (taking claim under 42 U.S.C. S1983 not ripe where adequate state law remedies exist) and Queen Anne Courts v. City of Lakeville, 726 F-Supp. 733,

739 (D. Minn. 1989) (section 1983 claims not ripe because plaintiff had not pursued adequate Minnesota state law remedies).

In the instant case, plaintiffs had adequate state remedies when the zoning became effective in August 1983. After obtaining a final zoning determination that restricted plaintiffs' development, plaintiffs could have brought an action to enjoin the ordinance, and, if successful, they could have obtained damages for a temporary taking, or a writ of mandamus compelling condemnation proceedings. None of these actions were taken.

Plaintiffs' current standing to bring a state action for injunction is questionable given the tax forfeiture. However, that does not make their state law remedies inadequate. As the Williamson Court stated: ". . . all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." Id. at 194.

The time for determining whether plaintiffs' state law remedies were adequate was August 1987 - the time of the alleged taking - and at that time they were. Accordingly, plaintiffs' federal claims must be dismissed.

Compensable Taking:

Assuming, for the sake of argument, that this matter is appropriate for determination, defendants still contend that this matter must be dismissed because the City did not engage in a compensable taking. This court believes that there are factual matters in dispute which would make this inappropriate for summary judgment.

In Parranto Bros. v. City of New Brighton, 425 N.W.2d 585, 590 (Minn. App. 1988) the Minnesota Court of Appeals set forth the factors which can be analyzed to determine whether a compensable taking has occurred. The Parranto court recognized that the United States Supreme Court has applied two different tests. Id. at 591.; See Actins v. City of Tiburon, 447 U.S. 255,

65 L.Ed.2d 106, 100 S.Ct. 2138 (1980) and Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 89 L.Ed.2d 166, 106 S.Ct. 1018, (1986). However, the Parranto court was unclear as to what circumstances dictated the use of one test over the other, and accordingly, set forth both analyses. Id. at 591-592.

The Agins analysis weighs private and public interests and asks the following questions: 1) does the zoning decision substantially advance a legitimate state interest; and 2) has the landowner been denied economically viable use of his land. Agins, 447 U.S. at 260. The Connolly Court identified three factors which have particular significance. Connolly, 475 U.S. at 224. Those factors are: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. Id. The economic impact of the city's downzoning is a material question of fact that is in dispute and is essential to a determination under either

the Agins or the Connolly analysis. As such, the matter is inappropriate for a summary judgment determination.

Derivative Claims:

Defendants argue yet another alternative theory for summary judgment with respect to plaintiffs' claims under 42 U.S.C. S1983. Defendants contend that plaintiffs' section 1983 claims must be dismissed as derivative of and contingent upon a just compensation claim that is without substantive merit. Given that this court has declined to find that plaintiff's claim is without substantive merit, there is no need to address this argument.

MTCC as a Proper Party:

Defendants argue that even if plaintiffs' eminent domain claims are deemed to have sufficient merit to withstand summary judgment, MTCC must be dismissed since it is a private non-profit corporation and that the right of just compensation lies against the public body which has taken the claimant's property. With respect to plaintiffs' takings claims this court would agree.

An unconstitutional taking is a governmental action or inaction. Czech v. City of Blaine, 312 Minn. 535, 539, 253 N.W.2d 272, 274 (1977). Defendant MTCC is not a governmental body and is not the source of the zoning regulation that plaintiffs believe deprived them of their property.

With respect to the conspiracy claims, plaintiffs argue that defendant MTCC is a proper party because it participated in the conspiracy to downzone. However, as defendants point out, under 42 U.S.C. S 1983, private parties who conspire to deprive a party of his or her civil rights must do so "under color of state law." Since MTCC did not pass any zoning ordinances, it is difficult to see how it was acting under color of state law. Defendant MTCC is not a proper party to this action and must be dismissed.

Corridor Properties as a Proper Party:

Plaintiff Corridor Properties is not a proper party to this action. It is undisputed that the alleged taking in this case

occurred in August 1987 when the zoning became effective. Corridor Properties did not acquire an interest in Muse Ten until it purchased the property from plaintiff Hunkins in December of 1988. Since Corridor Properties did not have an interest in the property on the date of the alleged taking, it does not have a claim for inverse condemnation. See Victor Company v. State, 290 Minn. 40, 45, 186 N.W.2d 172 (Minn. 1971) (party lacks standing to assert inverse condemnation claim when it did not have an interest in the property on the date of the alleged taking.) Defendants argue that the taking first occurred in August 1987, but the taking or damaging continued after that date. Defendants cite no authority for its proposition that there can be a continual taking. The law is clear. Plaintiff Corridor Properties is an improper party and must be dismissed.

B.A.N.